IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

FAO No. 20 of 2001.

Date of Decision: 15th September, 2006.

Kulbir Singh & others …Appellants.

Versus.

Rania and others … Respondents.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for Reporting?

For the Appellant(s): **Mr. Ajay Sharma, Advocate.**

For the Respondent(s): **Mr. N.K. Thakur, Advocate.**

Deepak Gupta, J

This appeal under Order 43 Rule 1(k) of the Code of Civil Procedure is directed against the order dated 20.10.2000 passed by the Additional District Judge (II), Kangra at Dharamsala whereby he has rejected the application moved by the present appellants for setting aside the abatement and permitting them to be brought on record.

The brief facts of the case are that the respondents herein filed a Civil Suit against Smt. Lal Dei that they were the tenants of the land. This suit was decreed. Smt. Lal Dei filed an appeal in the Court of District Judge, Kangra at Dharamsala which was assigned to the Additional District Judge (II), Kangra at Dharamsala. In the

lower appellate Court appellant Lal Dei was represented by Shri Atul Mahendru, Advocate. On 3.1.2000 the Court recorded the following orders:-

> " Shri Mohendru states for the respondent No.1 has died. Let appropriate steps be taken on 7.4.2000."

On 7.4.2000, the following order was passed:-

> "Shri Mohindru has not so far taken any steps to bring on record the L.Rs. of respondent No.1 Necessary steps if any be taken up on 28.4.2000."

An application was filed on 28.4.2000 by the appellant. In the application, it was stated that Smt. Lal Dei in fact had died on 1.12.1999 and that her husband had pre-deceased her. She was issueless and she had executed a will in favour of the present applicants/appellants. This application was contested and the learned lower appellate court vide order dated 20.10.2000 rejected the application on the ground that the applicants have failed to prove any sufficient cause not only in filing the application for bringing on record the legal representatives of the deceased but also for setting aside the abatement.

I have heard Mr.Ajay Sharma, learned counsel for the appellants and Mr. N.K.Thakur, learned counsel for the respondents.

At the very outset, it may be noticed that Smt. Lal Dei had died on 1.12.1999. A bare reading of the order dated 3.1.2000 reveals that Mr. Atul Mahendru stated before the Court that

respondent No.1 has died. It is apparent that he must have informed the Court that Smt. Lal Dei had died. It is also apparent that the counsel was aware about the factum of death of the deceased. The Court itself gave a date of more than three months and adjourned the matter to 7.4.2000 and ordered that the steps be taken on or before 7.4.2000. On 7.4.2000, the matter was adjourned to 28.4.2000 when the application was filed.

From the perusal of the application, it is apparent that the same was in fact prepared by the counsel on 7.4.2000 and was filed in the Court on 28.4.2000. The application for bringing on record the legal representatives should have been filed by 1.3.2000 and to set aside the abatement within 60 days thereafter. The application for bringing on record the legal representatives is definitely not within time but the application to set aside the abatement is within time.

In **Union of India v. Ram Charan (deceased) through his Legal Representatives,** AIR 1964 SC 215, the apex Court held that the Court should not be over strict in expecting the proof required for proving sufficient cause. The apex Court held that if abatement is set aside, the dispute can be determined on merits while, if the abatement is not set aside, the appellant is deprived of his right of proving the merits of his claim. The apex Court, however, went on to hold that this did not mean that the court should readily accept whatever the appellant alleges in his application and the court must be fully justified in considering the

merits of the evidence led to establish the grounds for delay in filing the application for bringing on record the legal representatives.

The mere allegation about his not coming to know of the death of the opposite party is not sufficient.

Shri N.K.Thakur learned counsel has also relied upon two judgments in case **Kamini Kumar Rudra Paul & others v. Manoranjan Kar & others,** AIR 1968 Tripura 34, and **Durgalal v. Ashrafilal (dead) and others** AIR 1973 Rajasthan 332, and states that the applicant under Order 22 rule 9 CPC must explain the day today delay and only thereafter delay can be condoned.

The law has undergone a sea change. A Constitution Bench of the apex Court in (2003) 3 SCC 272 **Sardar Amarjit Singh Kalra (Dead) By LRs and others v. Pramod Gupta (Smt) (Dead) By LRs. and others** has laid down as follows:-

> "Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 CPC as well as the subsequent amendments thereto would led credit and support to the view that they were devised to ensure their continuation and culmination in an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain

> intact and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice."

The apex Court has clearly held that a reading of the entire provisions of Order 22 CPC along with subsequent amendments made in 1976 lead to the conclusion that they were enacted to ensure that the proceedings are continued and decided on merits and the parties should not be non-suited on technical grounds. No doubt in case, the negligence of the party is very grave or the delay is very long, the court may not condone the delay. This depends on the facts of each case. In the present case, the application has been filed within five months of the death. In fact when the counsel informed the court, the Court itself adjourned the matter for more than three months and when the matter was taken up on 7.4.2000, it was again adjourned to 28.4.2000.

From the perusal of the application, it is noticed that the application was filed on 28.4.2000 and the averment made is that the party had met the counsel on 5.4.2000. Even if this averment is not accepted, it is apparent that the application was prepared on 7.4.2000 and the same was filed on 28.4.2000. There is no fault on the part of the applicant in this regard. The counsel could have filed the application on 7.4.2000.

Keeping in view the law laid down by the apex Court, I feel that there was sufficient cause shown by the applicants in bringing on record the legal representatives of the deceased within time.

Accordingly, the appeal is allowed and the impugned order passed by the learned lower appellate Court is set aside. Needless to say the mere fact that the applicants have been brought on record as the legal representatives of the deceased does not mean that the will propounded by them has been accepted to be a valid Will which is something which will have to be proved in appropriate proceedings.

Since the original suit was filed as far back as in 1991 and the appeal was filed before the lower appellate court in 1998, the learned lower appellate Court is directed to restore its appeal to its original number and decide the same in accordance with law as expeditiously as possible and in any event not later than 31st March, 2007.

Parties through their counsel are directed to appear before the learned lower appellate court on 20th October, 2006. The Registry shall ensure that the records should reach the Additional District Judge (II), Kangra at Dharamsala well before the date fixed.

No costs.

September 15, 2006. (Deepak Gupta), J.

s.